

BILL NO. S-97-08-01

SPECIAL ORDINANCE NO. S-----13-97

**AN ORDINANCE APPROVING INTERIM RIGHTS-
OF-WAY FRANCHISE AGREEMENT BETWEEN
THE CITY OF FORT WAYNE AND KMC TELECOM,
INC.**

WHEREAS, the Telecommunications Act of 1996 preserves the rights of municipalities to manage public rights-of-way and to receive adequate compensation for the use of public rights-of-way by telecommunications providers; and

WHEREAS, the City of Fort Wayne is proceeding to develop a permanent telecommunications right-of-way ordinance; and

WHEREAS, the Interim Rights-of-Way Franchise Agreement will allow the City of Fort Wayne to begin to construct a telecommunications system in anticipation of, and to expedite, competitive telecommunication services ; and

WHEREAS, said interim agreement is for a period of six (6) months; however, said interim agreement will be amended to conform to the final telecommunications franchise ordinance.

WHEREAS, KMC, Telecom, Inc. will pay the City a fee of \$.25 per linear foot of system occupying any City rights-of-way.

**NOW, THEREFORE, BE IT ORDAINED BY THE COMMON COUNCIL OF THE
CITY OF FORT WAYNE, INDIANA:**

SECTION 1. The Interim Rights-of-Way Franchise Agreement, attached hereto and made a part hereof, between the City of Fort Wayne, Indiana, and KMC Telecom Inc. is hereby approved and ratified.

SECTION 2. That this Ordinance be in effect from and after its passage and any and all necessary approval by the Mayor.



Council Member

APPROVED AS TO FORM AND LEGALITY



J. Timothy McCauley, City Attorney

INTERIM RIGHTS-OF-WAY FRANCHISE AGREEMENT

THIS AGREEMENT, made and entered into this ____ day of _____, 1997, by and between KMC Telecom Inc., a Delaware corporation, (hereinafter referred to as KMC), having an office at 1545 Route 206, Suite 300, Bedminster, NJ 07921; and the City of Fort Wayne (hereinafter referred to as "CITY"), having an office at One East Main Street, Fort Wayne, Indiana 46802; (KMC and CITY being collectively referred to herein as the "Parties").

WHEREAS, KMC has requested CITY to authorize the use of CITY rights-of-way for telecommunications purposes and for KMC to use and install its fiber optic cable and related facilities for the purpose of creating certain telecommunications capabilities; and

WHEREAS, CITY is currently developing a Master telecommunications ordinance to govern the use of its rights-of-way ordinance by telecommunications providers and other entities as authorized in the recently enacted federal telecommunications Act of 1996 and by Indiana state law; a copy of said ordinance as currently proposed is attached hereto and incorporated by reference herein; and

WHEREAS, CITY will grant to KMC the nonexclusive franchise to use CITY Rights-of-Way described in Exhibit A; and

WHEREAS, KMC has agreed to utilize the rights-of-way in accordance with the terms and conditions of this Agreement; and

WHEREAS, KMC and CITY agree that this agreement will be amended to conform to the telecommunications ordinance as finally adopted by the Common Council of the City of Fort Wayne.

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, the Parties mutually agree as follows:

ARTICLE 1. AUTHORITY FOR USE OF RIGHTS-OF-WAY AND SCOPE OF AGREEMENT

1.1 KMC has designed, engineered, constructed, acquired, leased or caused to be constructed, facilities and acquired appropriate interests in real property or other rights, all as may be required to provide and maintain telecommunications services in CITY and to locations in communities adjacent to CITY. KMC's maintenance obligations shall be performed in accordance with industry standards. KMC requests consent from CITY to use CITY rights-of-way as set forth in Exhibits A and B which are attached hereto and made part hereof:

Exhibit A	Route Diagram
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Exhibit B	Description of all Facilities, Appliances, and Location and Construction Requirements
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1.2 The CITY hereby grants a nonexclusive consent to provide access and use of its rights-of-way to KMC for the construction, installation and maintenance of its telecommunications transmission facilities within CITY as described in Exhibit A and Exhibit B. Under this Agreement, KMC may erect, install, construct, repair, replace, relocate, reconstruct, remove, and retain in, on, under, upon, across and along the rights-of-way within CITY as located and approved by CITY as set forth in paragraph 1.4 of this Agreement, such lines, cable, conductors, ducts, conduits, vaults,

manholes, appliances, pedestals, attachments, and other property and equipment as are necessary and appurtenant to the operation of the facilities, provided that all applicable federal, state, and CITY permits are applied for and granted, all fees paid and all other CITY codes and ordinances are otherwise complied with.

1.3 KMC shall construct and maintain its telecommunications facilities so as not to unreasonably interfere with other uses of the rights-of-way. Where utility lines are required to be underground, KMC agrees to place its lines underground. Except in an emergency, KMC shall use reasonable efforts to notify all residents affected by proposed work prior to commencement of such work.

1.4 Prior to commencement of construction, KMC shall file its plans, description of services, and Exhibits A and B with CITY Public Works Office for review and approval. CITY shall review these materials, to evaluate the legality and propriety of the location, safety and aesthetics of the construction plans, and to ensure there is not an adverse effect on CITY uses, the uses of others, or on adjoining properties. CITY Public Works Office shall complete its review within thirty (30) days. If CITY Public Works Office does not approve the plans based on the criteria set forth in this section, it must provide KMC notice of its disapproval and the reasons therefor in writing. Within thirty (30) days after receiving notice of CITY Public Works Office's disapproval, KMC may appeal the CITY Public Works Office's decision to the Mayor for a final determination.

1.5 KMC shall be responsible for all costs associated with its installation including: the costs borne by CITY or others during installation, the costs of repair and replacement to the rights-of-way due to KMC's installation, and costs incurred in removing or relocating its telecommunications facilities when required by CITY due to CITY requirements relating to maintenance and use of the rights-of-way for CITY purposes.

1.6 KMC agrees to meet the construction and technical requirements set forth in Section 11 of the attached Exhibit C.

ARTICLE 2. DEFINITIONS

Unless otherwise defined herein, the terms used in this Agreement shall have their normal or customary meanings. In addition, for the purposes of this Agreement, the following terms shall have the following meaning:

2.1 "rights-of-way" shall mean the surface, the air space above the surface and the area below the surface of any public street, public utility easement, or any other public property or public place.

2.2 "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received.

ARTICLE 3. TERM/TERMINATION

The Term of this Agreement shall commence on the date of Acceptance of this Agreement by CITY, as defined in Article 5 of this Agreement and shall end six (6) months thereafter. At which time, provided KMC is not then in default hereunder a franchise agreement fully consistent with the Fort Wayne Telecommunications ordinance will be processed. All application fees paid with this

agreement shall be credited toward application fees required under the telecommunications ordinance as finally adopted. It is the intent of CITY and KMC that this agreement will terminate on the Effective Date of the City's new telecommunications ordinance currently under consideration by CITY that will then be in effect.

ARTICLE 4. TRANSFER OF OWNERSHIP

KMC shall not sell, transfer, lease, assign, sublet or dispose of, in whole or in part, either by forced or involuntary sale, or by ordinary sale, consolidation or otherwise, the agreement or any of the rights or privileges granted by the agreement, without the prior consent of CITY.

ARTICLE 5. COMPENSATION

5.1 Application Fee

KMC shall pay CITY \$1,000 at the time it files its plans with CITY as described in this Article.

5.2 Use Fee

During the Term of this Agreement, KMC shall pay \$0.25 per linear foot per year to CITY for the franchise of CITY's rights-of-way, as defined in Exhibit A, prorated for the term of this Agreement.

5.3 KMC shall send all payments payable hereunder, to:

Fort Wayne Board of Public Works
City County Building
One East Main Street, Room 920
Fort Wayne, Indiana 46802

5.4 Any amounts not paid by KMC within thirty (30) days after receipt of written notice from CITY shall be subject to a late payment charge calculated from the invoice due date to the date paid, at an interest rate of 1% per month.

5.5 During the Term of this Agreement, any amounts paid by KMC shall be sent to Fort Wayne Board of Public Works and held in escrow by third party mutually agreed to between the City and KMC until the Effective Date of the City's new telecommunications ordinance.

ARTICLE 6. ACCEPTANCE

This Agreement shall be accepted by CITY upon approval of the Common Council of the City of Fort Wayne. Within thirty (30) days thereof, KMC shall deliver to CITY all payments, insurance certificates, applications, and performance of other requirements relating to commencement of construction as set forth in this Agreement.

ARTICLE 7. INDEMNIFICATION

7.1 KMC shall indemnify, hold harmless and defend CITY, its officers, boards, commissions, agents and employees from and against any and all lawsuits, claims, causes of action, liability, demands, damages, disability, losses, expenses, including reasonable attorneys' fees, resulting or in any manner arising from the action or inaction of KMC in constructing, operating, maintaining,

repairing or removing any of its facilities or in carrying on its business or operations in CITY, or in exercising or failing to exercise any right or privilege granted by this Agreement. This indemnity shall apply, without limitation, to any claim or cause of action for invasion of privacy, defamation, antitrust, negligence, theft, fire, violation or infringement of any copyright, trademark, trade name, service mark or patent, or intellectual property right of any Person, whether or not any act or omission complained of is authorized, allowed or prohibited by this Agreement.

7.2 CITY shall promptly notify KMC of any claims subject to indemnification and shall cooperate with all reasonable requests by KMC for information, documents, testimony or other assistance appropriate to a resolution of such claims. KMC shall have full responsibility for and control of any action or undertaking directed at the resolution of such claims.

ARTICLE 8. UTILITIES

KMC hereby agrees to pay any and all charges for utility services rendered to any of the sites on the route. Such charges can include, but are not limited to: electric power necessary for common alarms; interior and exterior lighting; environmental systems (air-conditioning); KMC electronics; any water necessary for the operation of the sites; any sewer charges necessary for operation of the site; and any trash/garbage fees assessed for the sites.

ARTICLE 9. INSURANCE

9.1 During the term of this Agreement, KMC shall obtain and maintain at KMC's sole expense, with financially reputable insurers which are licensed to do business in all jurisdictions where any work is performed, naming CITY as additional insured, not less than the following insurance:

- (a) Worker's compensation as provided for under any Worker's compensation or similar law in the jurisdiction where any work is performed with an employer's liability limit per Indiana state statute.
- (b) Commercial general liability, including coverage for contractual liability and products completed operations liability, with limit of not less than \$ 300,000 combined single limit per occurrence and \$5,000,000 aggregate for bodily injury, personal injury and property damage liability, naming CITY as an additional insured.
- (c) "All Risk" Property insurance covering not less than the full replacement cost of CITY's personal property while on a KMC job site.

9.2 Certificates of Insurance

KMC shall, as material condition of this Agreement, prior of the commencement of any work and prior to any renewal thereof, deliver to CITY a certificate of insurance, satisfactory in form and content to CITY, evidencing that the above insurance is in force and will not be cancelled or materially altered without first giving the CITY thirty (30) days prior written notice.

9.3 Nothing contained in Article 7 shall limit KMC's liability to CITY to the limits of insurance certified or carried.

ARTICLE 10. TAXES

KMC shall be fully responsible for the payment of all ad valorem, property, use and other taxes.

ARTICLE 11. MISCELLANEOUS

11.1 This Agreement, together with all Exhibits, shall constitute the entire Agreement and no negotiations or discussions prior to execution shall be of any effect.

11.2 the invalidity in whole or in part of any provision shall not affect the validity of any other provision.

11.3 The right and remedies of the Parties shall be cumulative and in addition to any other rights and remedies provided by law or equity. A waiver of a breach of any provision thereof shall not constitute a waiver of any other breach. The laws of the State of Indiana shall govern this Agreement.

11.4 Notices shall be in writing, mailed certified with return receipt requested, effective upon receipt and sent to:

KMC: KMC Telecom Inc.
1545 Route 206
Suite 300
Bedminster, New Jersey 07921
Attn: Michael A. Sternberg, President

CITY: The City of Fort Wayne
One East Main Street
Fort Wayne, Indiana 46802
Attention: Mayor Paul Helmke
Sandra Kennedy

with a copy sent to: Director, Board of Public Works
City-County Building
One East Main Street, Room 920
Fort Wayne, Indiana 46802

or to replacement addresses that may be later designated in writing.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year below written, but effective as of the day and year first set forth above.

Approved by the City of Fort Wayne Board of Public Works

Linda Buskirk, Director of Public Works

C. James Owen, Member

John Stafford, Member

Attest: _____
Patricia Crick, Clerk

Approved as to form and legality:

R. David Boyer, Associate City Attorney

THE CITY OF FORT WAYNE, IN KMC TELECOM INC.

By: _____
Paul Helmke, Mayor

By: _____

Attest: _____
Sandra Kennedy, City Clerk

STATE OF INDIANA)
)
COUNTY OF ALLEN) SS:

On this ____ day of _____, 1997, Mayor Paul Helmke and City Clerk Sandra Kennedy executed the foregoing instrument. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Notary Public

I am a Resident of _____ County, Indiana.

My Commission Expires:

STATE OF INDIANA)
)
COUNTY OF ALLEN) SS:

On this ____ day of _____, 1997, _____ executed the foregoing instrument. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Notary Public

I am a Resident of _____ County, Indiana.
My Commission Expires:

DIGEST SHEET

TITLE OF ORDINANCE SPECIAL ORDINANCE

DEPARTMENT REQUESTING ORDINANCE RIGHT - OF - WAY

SYNOPSIS OF ORDINANCE APPROVES INTERIM RIGHTS -OF- WAY FRANCHISE AGREEMENT
TO BEING CONSTRUCTION OF A TELECOMMUNICATIONS SYSTEM WITH KMC TELECOM, INC.

EFFECT OF PASSAGE AGREEMENT IS APPROVED

EFFECT OF NON-PASSAGE AGREEMENT IS NOT APPROVED - TELECOMMUNICATIONS SYSTEM
CANNOT BE CONSTRUCTED.

MONEY INVOLVED (DIRECT COSTS, EXPENDITURES, SAVINGS) _____

ASSIGNED TO COMMITTEE (PRESIDENT) _____

Fredrikson & Byron, P.A.

Memo

To: Fort Wayne Common Council
From: Adrian E. Herbst and Anthony S. Mendoza
Date: August 6, 1997
Re: Interim Rights-of-Way Franchise Agreement With KMC Telecom, Inc.

Attached to this memorandum is a proposed Interim Rights-of-Way Franchise Agreement between the City of Fort Wayne and KMC SouthEast Corporation. The terms and conditions of this Interim Agreement have been reviewed by City staff and by officials for KMC. KMC has agreed to the terms and conditions set forth in this Agreement. City staff recommends that this Interim Agreement be adopted by the Common Council.

The purpose of this Agreement is to allow KMC to begin construction of its telecommunications system while the City's permanent telecommunications franchise ordinance is being finalized. The City's permanent telecommunications right-of-way ordinance is being developed pursuant to the Telecommunications Act of 1996, which preserved the rights of municipalities to manage public rights-of-way and receive adequate compensation for the use of public rights-of-way by telecommunications providers. The City hired Fredrikson & Byron to assist it in developing a comprehensive telecommunications franchise ordinance. The City is confident that a telecommunications franchise ordinance will be finalized this Fall. However, in order to expedite the arrival of competitive telecommunications services to the City, City staff believes it is in the best interest of the community to grant this interim agreement and allow KMC to begin construction of its system.

The most important aspect of this Agreement are:

1. It has a term of six (6) months. If a telecommunications franchise ordinance cannot be developed over the objections of the telecommunications industry in Fort Wayne, this franchise agreement will either terminate or be extended. KMC could lose its right to operate in the City's public rights-of-way.
2. The Interim Agreement will be amended to conform to the telecommunications franchise ordinance finally adopted by the Common Council.
3. Under the Interim Agreement, KMC has agreed to pay the City a franchise fee of 25 cents per linear foot of system occupying City rights-of-way.

Although Fredrikson & Byron believes it is always preferable to have a permanently adopted telecommunications franchise ordinance in place before any franchise agreements are executed, Fredrikson & Byron understands the City's desire to expedite the arrival of competitive

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telecommunications services to the City. Based on that understanding, Fredrikson & Byron developed this Interim Franchise Agreement for the City with two objectives in mind:

1. To preserve the rights of the City to adopt a permanent telecommunications franchise ordinance that fully meets the needs of the community.
2. To develop an Interim Agreement that allows for the arrival of competitive telecommunications services to the City.

Fredrikson & Byron believes this Interim Agreement meets both of those objectives.

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Read the first time in full and on motion by Belmont,
and duly adopted, read the second time by title and referred to the Committee on Finance, (and the City Plan Commission for recommendation)
and Public Hearing to be held after due legal notice, at the Common Council Conference
Room 128, City-County Building, Fort Wayne, Indiana, on _____ day of _____, 19____ at _____
o'clock _____ M., E.S.T.

DATED: 8-12-97

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Read the third time in full and on motion by Belmont,
and duly adopted, placed on its passage. PASSED
by the following vote:

	AYES	NAYS	ABSTAINED	ABSENT
TOTAL VOTES	<u>8</u>			<u>1</u>
BENDER	<u>✓</u>			
CRAWFORD	<u>✓</u>			
EDMONDS	<u>✓</u>			
HALL	<u>✓</u>			
HAYHURST				<u>✓</u>
HENRY	<u>✓</u>			
LUNSEY	<u>✓</u>			
RAVINE	<u>✓</u>			
SCHMIDT	<u>✓</u>			

DATED: 8-26-97

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Passed and adopted by the Common Council of the City of Fort Wayne, Indiana,
as (ANNEXATION) _____ (APPROPRIATION) _____ (GENERAL) _____ (SPECIAL) _____

(ZONING) _____ ORDINANCE _____ RESOLUTION NO. S-73-97
on the 26th day of August, 1997

ATTEST: Sandra E. Kennedy SEAL Thomas P. Henry
SANDRA E. KENNEDY, CITY CLERK PRESIDING OFFICER

Presented by me to the Mayor of the City of Fort Wayne, Indiana, on the
27th day of August, 1997,
at the hour of 11:30 o'clock _____ M., E.S.T.

Sandra E. Kennedy
SANDRA E. KENNEDY, CITY CLERK

Approved and signed by me this 28th day
of August, 1997, at the hour of 1:00
o'clock _____ M., E.S.T.

Paul Helmke
PAUL HELMKE, MAYOR

BILL NO. S-97-08-01

REPORT OF THE COMMITTEE ON FINANCE

DONALD J. SCHMIDT - JOHN N. CRAWFORD - CO-CHAIR
ALL COUNCIL MEMBERS

WE, YOUR COMMITTEE ON FINANCE TO WHOM WAS
REFERRED AN (ORDINANCE) (~~RESOLUTION~~) approving Interim Rights-
Of-Way Franchise Agreement between the City of Fort Wayne and KMC
Telecom, Inc.

HAVE HAD SAID (ORDINANCE) ~~RESOLUTION~~ UNDER CONSIDERATION
AND BEG LEAVE TO REPORT BACK TO THE COMMON COUNCIL THAT SAID
(ORDINANCE) (~~RESOLUTION~~)

DO PASS

DO NOT PASS

ABSTAIN

NO REC

O.D. Schmitt
 Martin A. Buehl
 Mike Lense
 John P. Henry
 John W. Crump
 Michael Hill

DATED: 8-26-99

Sandra E. Kennedy
City Clerk